

his designee or the hearing officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Associate Administrator may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the FAA, consider a violation of this subpart sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

PART 17—PROCEDURES FOR PROTESTS AND CONTRACTS DISPUTES

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APPENDIX A TO PART 17—ALTERNATIVE DISPUTE RESOLUTION (ADR)

AUTHORITY: 5 U.S.C. 570–581, 49 U.S.C. 106(f)(2), 40110, 40111, 40112, 46102, 46014, 46105, 46109, and 46110.

SOURCE: Docket No. FAA–1998–4379, 64 FR 32936, June 18, 1999, unless otherwise noted.]

Subpart A—General

§ 17.1 Applicability.

This part applies to all protests or contract disputes against the FAA that are brought on or after June 28, 1999, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996.

§ 17.3 Definitions.

(a) *Accrual* mean to come into existence as a legally enforceable claim.

(b) *Accrual of a contract claim* means that all events relating to a claim have occurred which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on such equitable grounds as where the office of Dispute Resolution for Acquisition determines that there has been active concealment or fraud or where it finds that the facts were inherently unknowable.

(c) *Acquisition Management System* (AMS) establishes the policies, guiding principles, and internal procedures for the FAA's acquisition system.

(d) *Administrator* means the Administrator of the Federal Aviation Administration.

(e) *Alternative Dispute Resolution* (ADR) is the primary means of dispute resolution that would be employed by the FAA's Office of Dispute Resolution for Acquisition. See Appendix A of this part.

(f) *Compensated Neutral* refers to an impartial third party chosen by the parties to act as a facilitator, mediator, or arbitrator functioning to resolve the protest or contract dispute under the auspices of the Office of Dispute Resolution for Acquisition. The parties pay equally for the services of a Compensated Neutral, unless otherwise agreed to by the parties. A Dispute Resolution Officer (DRO) or Neutral cannot be a Compensated Neutral.

(g) *Contract dispute*, as used in this part, means a written request to the Office of Dispute Resolution for Acquisition seeking resolution, under an existing FAA contract subject to the AMS, of a claim for the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to or involving an alleged breach of that contract. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision. Contract disputes for purposes of ADR only may also involve contracts not subject to the AMS.

(h) *Default Adjudicative Process* is an adjudicative process used to resolve protests or contract disputes where the parties cannot achieve resolution through informal communication or the use of ADR. The Default Adjudicative Process is conducted by a DRO or Special Master selected by the Office of Dispute Resolution for Acquisition to serve as "adjudicative officers," as that term is used in part 14 of this chapter.

(i) *Discovery* is the procedure where opposing parties in a protest or contract dispute may, either voluntarily or to the extent directed by the Office of Dispute Resolution for Acquisition, obtain testimony from, or documents and information held by, other parties or non-parties.

(j) *Dispute Resolution Officer* (DRO) is a licensed attorney reporting to the Of-

fice of Dispute Resolution for Acquisition. The term DRO can include the Director of the Office of Dispute Resolution for Acquisition, Office of Dispute Resolution for Acquisition staff attorneys or other FAA attorneys assigned to the Office of Dispute Resolution for Acquisition.

(k) *An interested party*, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract. Proposed subcontractors are not "interested parties" within this definition and are not eligible to submit protests to the Office of Dispute Resolution for Acquisition.

(l) An *intervenor* is an interested party other than the protester whose participation in a protest is allowed by the Office of Dispute Resolution for Acquisition. For a post-award protest, the awardee of the contract that is the subject of the protest shall be allowed, upon request, to participate as an intervenor in the protest. In such a protest, no other interested parties shall be allowed to participate as intervenors.

(m) *Neutral* refers to an impartial third party in the ADR process chosen by the Office of Dispute Resolution for Acquisition to act as a facilitator, mediator, arbitrator, or otherwise to resolve a protest or contract dispute. A Neutral can be a DRO or a person not an employee of the FAA who serves on behalf of the Office of Dispute Resolution for Acquisition.

(n) The *Office of Dispute Resolution for Acquisition* (ODRA), under the direction of the Director, acts on behalf of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to be the Administrator on matters concerning protests or contract disputes.

(o) *Parties* include the protester(s) or (in the case of a contract dispute) the contractor, the FAA, and any intervenor(s).

(p) *Product Team*, as used in these rules, refers to the FAA organization(s) responsible for the procurement activity, without regard to funding source, and includes the Contracting Officer (CO) and assigned FAA legal counsel,

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when the FAA organization(s) represent(s) the FAA as a party to a protest or contract dispute before the Office of Dispute Resolution for Acquisition. The CO is responsible for all Product Team communications with and submissions to the Office of Dispute Resolution for Acquisition through assigned FAA counsel.

(q) *Screening Information Request* (SIR) means a request by the FAA for documentation, information, presentations, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA. The purpose of a SIR is for the FAA to obtain information needed for it to proceed with a source selection decision and contract award.

(r) A *Special Master* is an attorney, usually with extensive adjudicative experience, who has been assigned by the Office of Dispute Resolution for Acquisition to act as its finder of fact, and to make findings and recommendations based upon AMS policy and applicable law and authorities in the Default Adjudicative Process.

§ 17.5 Delegation of authority.

(a) The authority of the Administrator to conduct dispute resolution proceedings concerning acquisition matters, is delegated to the Director of the Office of Dispute Resolution for Acquisition.

(b) The Director of the Office of Dispute Resolution for Acquisition may redelegate to Special Masters and DROs such delegated authority in paragraph (a) of this section as is deemed necessary by the Director for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions or other disciplinary actions.

§ 17.7 Filing and computation of time.

(a) Filing of a protest or contract dispute may be accomplished by mail, overnight delivery, hand delivery, or by facsimile. A protest or contract dispute is considered to be filed on the date it is received by the Office of Dispute Resolution for Acquisition during normal business hours. The Office of Dispute Resolution for Acquisition's normal business hours are from 8:30

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a.m. to 5 p.m. est or edt, whichever is in use. A protest or contract dispute received via mail, after the time period prescribed for filing, shall not be considered timely filed even though it may be postmarked within the time period prescribed for filing.

(b) Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a contract dispute may be accomplished by any means available in paragraph (a) of this section. Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a protest may only be accomplished by overnight delivery, hand delivery or facsimile.

(c) The time limits stated in this part are calculated in business days, which exclude weekends and Federal holidays. In computing time, the day of the event beginning a period of time shall not be included. If the last day of a period falls on a weekend or a Federal holiday, the first business day following the weekend or holiday shall be considered the last day of the period.

§ 17.9 Protective orders.

(a) The Office of Dispute Resolution for Acquisition may issue protective orders addressing the treatment of protected information, either at the request of a party or upon its own initiative. Such information may include proprietary, confidential, or source-selection-sensitive material, or other information the release of which could result in a competitive advantage to one or more firms.

(b) The terms of the Office of Dispute Resolution for Acquisition's standard protective order may be altered to suit particular circumstances, by negotiation of the parties, subject to the approval of the Office of Dispute Resolution for Acquisition. The protective order establishes procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the Office of Dispute

Resolution for Acquisition, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decisionmaking for any firm that could gain a competitive advantage from access to the protected information and that the applicant will diligently protect any protected information received from inadvertent disclosure. Objections to an applicant's admission shall be raised within two (2) days of the application, although the Office of Dispute Resolution for Acquisition may consider objections raised after that time for good cause.

(d) Any violation of the terms of a protective order may result in the imposition of sanctions or the taking of the actions as the Office of Dispute Resolution for Acquisition deems appropriate.

(e) The parties are permitted to agree upon what material is to be covered by a protective order, subject to approval by the Office of Dispute Resolution for Acquisition.

Subpart B—Protests

§ 17.11 Matters not subject to protest.

The following matters may not be protested before the Office of Dispute Resolution for Acquisition:

- (a) FAA purchases from or through, state, local, and tribal governments and public authorities;
- (b) FAA purchases from or through other federal agencies;
- (c) Grants;
- (d) Cooperative agreements;
- (e) Other transactions which do not fall into the category of procurement contracts subject to the AMS.

§ 17.13 Dispute resolution process for protests.

(a) Protests concerning FAA SIRs or contract awards shall be resolved pursuant to this part.

(b) The offeror initially should attempt to resolve any issues concerning potential protests with the CO. The CO, in coordination with FAA legal counsel, will make reasonable efforts to answer questions promptly and completely, and, where possible, to resolve concerns or controversies.

(c) Offerors or prospective offerors shall file a protest with the Office of Dispute Resolution for Acquisition in accordance with § 17.15. The protest time limitations set forth in § 17.15 will not be extended by attempts to resolve a potential protest with the CO. Other than the time limitations specified in § 17.15 for the filing of protests, the Office of Dispute Resolution for Acquisition retains the discretion to modify any time constraints imposed in connection with protests.

(d) In accordance with § 17.17, the Office of Dispute Resolution for Acquisition shall convene a status conference for the protest. Under the procedures set forth in that section, the parties generally will either decide to utilize Alternative Dispute Resolution (ADR) techniques to resolve the protest, pursuant to subpart D of this part, or they will proceed under the Default Adjudicative Process set forth in subpart E of this part. However, as provided in § 17.31(c), informal ADR techniques may be utilized simultaneously with ongoing adjudication.

(e) The Office of Dispute Resolution for Acquisition Director shall designate Dispute Resolution Officers (DROs) or Special Masters for protests.

(f) Multiple protests concerning the same SIR, solicitation, or contract award may be consolidated at the discretion of the Office of Dispute Resolution for Acquisition, and assigned to a single DRO or Special Master for adjudication.

(g) Procurement activities, and, where applicable, contractor performance pending resolution of a protest shall continue during the pendency of a protest, unless there is a compelling reason to suspend or delay all or part of the procurement activities. Pursuant to §§ 17.15(d) and 17.17(b), the Office of Dispute Resolution for Acquisition may recommend suspension of award or delay of contract performance, in whole or in part, for a compelling reason. A decision to suspend or delay procurement activities or contractor performance would be made in writing by the FAA Administrator or the Administrator's delegate.

§ 17.15 Filing a protest.

(a) Only an interested party may file a protest, and shall initiate a protest by filing a written protest with the Office of Dispute Resolution for Acquisition within the times set forth below, or the protest shall be dismissed as untimely:

(1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.

(2) In procurements where proposals are requested, alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation;

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

(b) Protest shall be filed at:

(1) Office of Dispute Resolution for Acquisition, Federal Aviation Administration, AGC-70, 3rd Floor, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267-3290, facsimile: (202) 267-3720; or

(2) Other address as shall be published from time to time in the FEDERAL REGISTER.

(c) A Protest shall be in writing, and set forth:

(1) The protester's name, address, telephone number, and facsimile (FAX) number;

(2) The name, address, telephone number, and FAX number of a person designated by the protester (Protester Designee), and who shall be duly authorized to represent the protester, to be the point of contact;

(3) The SIR number or, if available, the contract number and the name of the CO;

(4) The basis for the protester's status as an interested party;

(5) The facts supporting the timeliness of the protest;

(6) Whether the protester requests a protective order, the material to be protected, and attach a redacted copy of that material;

(7) A detailed statement of both the legal and factual grounds of the protest, and attach one (1) copy of each relevant document;

(8) The remedy or remedies sought by the protester, as set forth in § 17.21;

(9) The signature of the Protester Designee, or another person duly authorized to represent the protester.

(d) If the protester wishes to request a suspension or delay of the procurement, in whole or in part, and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement because of the protested action, the protester shall:

(1) Set forth each such compelling reason, supply all facts supporting the protester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.

(2) Clearly identify any adverse consequences to the protester, the FAA, or any interested party, should the FAA not suspend or delay the procurement.

(e) At the same time as filing the protest with the Office of Dispute Resolution for Acquisition, the protester shall serve a copy of the protest on the CO and any other official designated in the SIR for receipt of protests by means reasonably calculated to be received by the CO on the same day as it is to be received by the Office of Dispute Resolution for Acquisition. The protest shall include a signed statement from the protester, certifying to the Office of Dispute Resolution for Acquisition the manner of service, date, and time when a copy of the protest was served on the CO and other designated official(s).

(f) Upon receipt of the protest, the CO shall inform the Office of Dispute Resolution for Acquisition of the

names, addresses, and telephone and facsimile numbers of the awardee and/or other interested parties, if known, and shall, in such notice, designate a person as the point of contact for the Office of Dispute Resolution for Acquisition by facsimile. The CO shall also notify the awardee and/or interested parties in writing of the existence of the protest the same day as the CO provides the foregoing information to the Office of Dispute Resolution for Acquisition. The awardee and/or interested parties shall notify the ODRA in writing, of their interest in participating in the protest as intervenors within two (2) business days of receipt of the CO's notification, and shall, in such notice, designate a person as the point of contact for the ODRA. Such notice may be submitted to the ODRA by facsimile.

(g) The Office of Dispute Resolution for Acquisition has discretion to designate the parties who shall participate in the protest as intervenors. For awarded contracts, only the awardee may participate as an intervenor.

[Doc. No. FAA-1998-4379, 64 FR 32936, June 18, 1999; 64 FR 47362, Aug. 31, 1999; 72 FR 68474, Dec. 5, 2007]

§ 17.17 Initial protest procedures.

(a) If, as part of a protest, the protester requests a suspension or delay of procurement, in whole or in part, pursuant to § 17.15(d), the Product Team shall submit a response to the request to the Office of Dispute Resolution for Acquisition within two (2) business days of receipt of the protest. Copies of the response shall be furnished to the protester and any intervenor(s) so as to be received within the same two (2) business days. The protester and any intervenor(s) shall have the opportunity of providing additional comments on the response within an additional period of two (2) business days. Based on its review of such submissions, the Office of Dispute Resolution for Acquisition, in its discretion, may recommend such suspension or delay to the Administrator or the Administrator's designee.

(b) Within five (5) business days of the filing of a protest, or as soon thereafter as practicable, the Office of Dispute Resolution for Acquisition shall convene a status conference to—

- (1) Review procedures;
- (2) Identify and develop issues related to summary dismissal and suspension recommendations;
- (3) Handle issues related to protected information and the issuance of any needed protective order;
- (4) Encourage the parties to use ADR;
- (5) Conduct or arrange for early neutral evaluation of the protest by a DRO or Neutral or Compensated Neutral, at the discretion of the Office of Dispute Resolution for Acquisition and/or based upon the agreement or request of any party(ies) seeking such evaluation; and
- (6) For any other reason deemed appropriate by the DRO or by the Office of Dispute Resolution for Acquisition.

(c) On the fifth business day following the status conference, the Product Team and protester will file with the Office of Dispute Resolution for Acquisition—

(1) A joint statement that they have decided to pursue ADR proceedings in lieu of adjudication in order to resolve the protest; or

(2) Joint or separate written explanations as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed.

(d) Should the Product Team and protester elect to utilize ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an Office of Dispute Resolution for Acquisition-designated Neutral or a Compensated Neutral of their own choosing) pursuant to § 17.33(c), and shall execute and file with the Office of Dispute Resolution for Acquisition a written ADR agreement within five (5) business days after the status conference. Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.

(e) Should the Product Team or protester indicate at the status conference that ADR proceedings will not be used, then within ten (10) business days following the status conference, the Product Team will file with the Office of Dispute Resolution for Acquisition a Product Team Response to the protest. The Office of Dispute Resolution for Acquisition may alter the schedule for filing of the Product Team Response to

accommodate the requirements of a particular protest.

(f) The Product Team Response shall consist of a written chronological statement of pertinent facts, and a written presentation of applicable legal or other defenses. The Product Team Response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed and tabbed. A copy of the response shall be furnished so as to be received by the protester and any intervenor(s) on the same date it is filed with the Office of Dispute Resolution for Acquisition, if practicable, but in any event no later than one (1) business day after the date if it is filed with the Office of Dispute Resolution for Acquisition. In all cases, the Product Team shall indicate the method of service used.

(g) Should the parties pursue ADR proceedings under subpart D of this part and fail to achieve a complete resolution of the protest via ADR, the Office of Dispute Resolution for Acquisition, upon notification of that fact by any of the parties, shall designate a DRO or Special Master for purposes of adjudication under subpart E of this part, and the DRO or Special Master shall convene a status conference, wherein he/she shall establish a schedule for the filing of the Product Team Response and further submissions.

(h) Upon submission of the Product Team Response, the protest will proceed under the Default Adjudicative Process pursuant to § 17.37.

(i) The time limitations of this section maybe extended by the Office of Dispute Resolution for Acquisition for good cause.

§ 17.19 Dismissal or summary decision of protests.

(a) At any time during the protest, any party may request, by motion to the Office of Dispute Resolution for Acquisition, that—

(1) The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, if the protester fails to establish that the protest is timely, or that the protester has no standing to pursue the protest;

(2) The protest, or any count or portion of a protest, be dismissed, if frivolous or without basis in fact or law, or

for failure to state a claim upon which relief may be had;

(3) A summary decision be issued with respect to the protest, or any count or portion of a protest, if:

(i) The undisputed material facts demonstrate a rational basis for the Product Team action or inaction in question, and there are no other material facts in dispute that would overcome a finding of such a rational basis; or

(ii) The undisputed material facts demonstrate, that no rational basis exists for the Product Team action or inaction in question, and there are no material facts in dispute that would overcome a finding of the lack of such a rational basis.

(b) In connection with any request for dismissal or summary decision, the Office of Dispute Resolution for Acquisition shall consider any material facts in dispute, in a light most favorable to the party against whom the request is made.

(c) Either upon motion by a party or on its own initiative, the Office of Dispute Resolution for Acquisition may, at any time, exercise its discretion to:

(1) Recommend to the Administrator dismissal or the issuance of a summary decision with respect to the entire protest;

(2) Dismiss the entire protest or issue a summary decision with respect to the entire protest, if delegated that authority by the Administrator; or

(3) Dismiss or issue a summary decision with respect to any count or portion of a protest.

(d) A dismissal or summary decision regarding the entire protest by either the Administrator, or the Office of Dispute Resolution for Acquisition by delegation, shall be construed as a final agency order. A dismissal or summary decision that does not resolve all counts or portions of a protest shall not constitute a final agency order, unless and until such dismissal or decision is incorporated or otherwise adopted in a decision by the Administrator (or the Office of Dispute Resolution for Acquisition, by delegation) regarding the entire protest.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the

Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.

§ 17.21 Protest remedies.

(a) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes. Such remedies may include, but are not limited to one or more, or a combination of, the following—

- (1) Amend the SIR;
- (2) Refrain from exercising options under the contract;
- (3) Issue a new SIR;
- (4) Require recompetition;
- (5) Terminate an existing contract for the FAA's convenience;
- (6) Direct an award to the protester;
- (7) Award bid and proposal costs; or
- (8) Any combination of the above remedies, or any other action consistent with the AMS that is appropriate under the circumstances.

(b) In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the FAA.

(c) Attorney's fees of a prevailing protester are allowable to the extent permitted by the Equal Access to Justice Act, 5 U.S.C. 504(a)(1)(EAJA).

Subpart C—Contract Disputes

§ 17.23 Dispute resolution process for contract disputes.

(a) All contract disputes arising under contracts subject to the AMS shall be resolved under this subpart.

(b) Contractors shall file contract disputes with the Office of Dispute Res-

olution for Acquisition and the CO pursuant to § 17.25.

(c) After filing the contract dispute, the contractor should seek informal resolution with the CO:

(1) The CO, with the advice of FAA legal counsel, has full discretion to settle contract disputes, except where the matter involves fraud;

(2) The parties shall have up to twenty (20) business days within which to resolve the dispute informally, and may contact the Office of Dispute Resolution for Acquisition for assistance in facilitating such a resolution; and

(3) If no informal resolution is achieved during the twenty (20) business day period, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition pursuant to § 17.27.

(d) If informal resolution of the contract dispute appears probable, the Office of Dispute Resolution for Acquisition shall extend the time for the filing of the joint statement under § 17.27 for up to an additional twenty (20) business days, upon joint request of the CO and contractor.

(e) The Office of Dispute Resolution for Acquisition shall hold a status conference with the parties within ten (10) business days after receipt of the joint statement required by § 17.27, or as soon thereafter as is practicable, in order to establish the procedures to be utilized to resolve the contract dispute.

(f) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies for a successful contract dispute, that are consistent with the AMS and applicable law.

§ 17.25 Filing a contract dispute.

(a) Contract disputes are to be in writing and shall contain:

(1) The contractor's name, address, telephone and fax numbers and the name, address, telephone and fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;

(2) The contract number and the name of the Contracting Officer;

(3) A detailed chronological statement of the facts and of the legal grounds for the contractor's positions regarding each element or count of the contract dispute (i.e., broken down by

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individual claim item), citing to relevant contract provisions and documents and attaching copies of those provisions and documents;

(4) All information establishing that the contract dispute was timely filed;

(5) A request for a specific remedy, and if a monetary remedy is requested, a sum certain must be specified and pertinent cost information and documentation (e.g., invoices and cancelled checks) attached, broken down by individual claim item and summarized; and

(6) The signature of a duly authorized representative of the initiating party.

(b) Contract disputes shall be filed by mail, in person, by overnight delivery or by facsimile at the following address:

(1) Office of Dispute Resolution for Acquisition, Federal Aviation Administration, AGC-70, 3rd Floor, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267-3290, facsimile: (202) 267-3720; or

(2) Other address as shall be published from time to time in the FEDERAL REGISTER.

(c) A contract dispute against the FAA shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the accrual of the contract claim involved. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise shall be filed within two (2) years after the accrual of the contract claim. If an underlying contract entered into prior to the effective date of this part provides for time limitations for filing of contract disputes with The Office of Dispute Resolution for Acquisition which differ from the aforesaid two (2) year period, the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the Office of Dispute Resolution for Acquisition a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA claims related to warranty issues, gross mistakes amounting to fraud or latent defects. FAA claims against the contractor based on warranty issues must be filed within the

time specified under applicable contract warranty provisions. Any FAA claims against the contractor based on gross mistakes amounting to fraud or latent defects shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect.

(d) A party shall serve a copy of the contract dispute upon the other party, by means reasonably calculated to be received on the same day as the filing is to be received by the Office of Dispute Resolution for Acquisition.

[Docket No. FAA-1998-4379, 64 FR 32936, June 18, 1999, as amended at 72 FR 68474, Dec. 5, 2007]

§ 17.27 Submission of joint or separate statements.

(a) If the matter has not been resolved informally, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition no later than twenty (20) business days after the filing of the contract dispute. The Office of Dispute Resolution for Acquisition may extend this time, pursuant to § 17.23(d).

(b) The statement(s) shall include either—

(1) A joint request for ADR, and an executed ADR agreement, pursuant to § 17.33(d), specifying which ADR techniques will be employed; or

(2) Written explanation(s) as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed.

(c) Such statements shall be directed to the following address:

(1) Office of Dispute Resolution for Acquisition, Federal Aviation Administration, AGC-70, 3rd Floor, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267-3290, facsimile: (202) 267-3720; or

(2) Other address as shall be published from time to time in the FEDERAL REGISTER.

(d) The submission of a statement which indicates that ADR will not be utilized will not in any way preclude the parties from engaging in informal

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ADR techniques with the Office of Dispute Resolution for Acquisition (neutral evaluation and/or informal mediation) concurrently with ongoing adjudication under the Default Adjudicative Process, pursuant to § 17.31(c).

[Docket No. FAA-1998-4379, 64 FR 32936, June 18, 1999, as amended at 72 FR 68474, Dec. 5, 2007]

§ 17.29 Dismissal or summary decision of contract disputes.

(a) Any party may request, by motion to the Office of Dispute Resolution for Acquisition, that a contract dispute be dismissed, or that a count or portion of a contract dispute be stricken, if:

(1) It was not timely filed with the Office of Dispute Resolution for Acquisition;

(2) It was filed by a subcontractor;

(3) It fails to state a matter upon which relief may be had; or

(4) It involves a matter not subject to the jurisdiction of the Office of Dispute Resolution for Acquisition.

(b) In connection with any request for dismissal of a contract dispute, or to strike a count or portion thereof, the Office of Dispute Resolution for Acquisition should consider any material facts in dispute in a light most favorable to the party against whom the request for dismissal is made.

(c) At any time, whether pursuant to a motion or request or on its own initiative and at its discretion, the Office of Dispute Resolution for Acquisition may—

(1) Dismiss or strike a count or portion of a contract dispute;

(2) Recommend to the Administrator that the entire contract dispute be dismissed; or

(3) With delegation from the Administrator, dismiss the entire contract dispute.

(d) An order of dismissal of the entire contract dispute, issued either by the Administrator or by the Office of Dispute Resolution for Acquisition where delegation exists, on the grounds set forth in this section, shall constitute a final agency order. An Office of Dispute Resolution for Acquisition order dismissing or striking a count or portion of a contract dispute shall not constitute a final agency order, unless and until such Office of Dispute Resolution

for Acquisition order is incorporated or otherwise adopted in a decision of the Administrator or the Administrator's delegatee.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to a proposed dismissal or summary decision.

Subpart D—Alternative Dispute Resolution

§ 17.31 Use of alternative dispute resolution.

(a) The Office of Dispute Resolution for Acquisition shall encourage the parties to utilize ADR as their primary means to resolve protests and contract disputes.

(b) The parties shall make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The Office of Dispute Resolution for Acquisition will encourage use of ADR techniques such as mediation, neutral evaluation, or minitrials, or variations of these techniques as agreed by the parties and approved by the Office of Dispute Resolution for Acquisition. The Office of Dispute Resolution for Acquisition shall assign a DRO to explore ADR options with the parties and to arrange for an early neutral evaluation of the merits of a case, if requested by any party.

(c) The Default Adjudicative Process will be used where the parties cannot achieve agreement on the use of ADR; or where ADR has been employed but has not resolved all pending issues in dispute; or where the Office of Dispute Resolution for Acquisition concludes that ADR will not provide an expeditious means of resolving a particular dispute. Even where the Default Adjudicative Process is to be used, the Office of Dispute Resolution for Acquisition, with the parties consent, may employ informal ADR techniques concurrently with and in parallel to adjudication.

§ 17.33 Election of alternative dispute resolution process.

(a) The Office of Dispute Resolution for Acquisition will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually Compensated Neutral, if the parties agree as to how the costs of any such Compensated Neutral are to be shared.

(b) The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition within five (5) business days after the Office of Dispute Resolution for Acquisition conducts a status conference pursuant to § 17.17(c). The Office of Dispute Resolution for Acquisition may extend this time for good cause.

(c) The parties using an ADR process to resolve a contract dispute shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition as part of the joint statement specified under § 17.27.

(d) The parties to a protest or contract dispute who elect to use ADR must submit to the Office of Dispute Resolution for Acquisition an ADR agreement setting forth:

- (1) The type of ADR technique(s) to be used;
- (2) The agreed-upon manner of using the ADR process; and
- (3) Whether the parties agree to use a Neutral through The Office of Dispute Resolution for Acquisition or to use a Compensated Neutral of their choosing, and, if a Compensated Neutral is to be used, how the cost of the Compensated Neutral's services will be shared.

(e) Non-binding ADR techniques are not mutually exclusive, and may be used in combination if the parties agree that a combination is most appropriate to the dispute. The techniques to be employed must be determined in advance by the parties and shall be expressly described in their

ADR agreement. The agreement may provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter. An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Default Adjudicative Process, upon the election of any party. Notwithstanding such termination, the parties may still engage with the Office of Dispute Resolution for Acquisition in informal ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication, pursuant to § 17.31(c).

(f) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.

(g) For protests, the ADR process shall be completed within twenty (20) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.

(h) For contract disputes, the ADR process shall be completed within forty (40) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.

(i) The parties shall submit to the Office of Dispute Resolution for Acquisition an agreed-upon protective order, if necessary, in accordance with the requirements of § 17.9.

§ 17.35 Selection of neutrals for the alternative dispute resolution process.

(a) In connection with the ADR process, the parties may select a Compensated Neutral acceptable to both, or

may request the Office of Dispute Resolution for Acquisition to provide the services of a DRO or other Neutral.

(b) In cases where the parties select a Compensated Neutral who is not familiar with Office of Dispute Resolution for Acquisition procedural matters, the parties or Compensated Neutral may request the Office of Dispute Resolution for Acquisition for the services of a DRO to advise on such matters.

Subpart E—Default Adjudicative Process

§ 17.37 Default adjudicative process for protests.

(a) Other than for the resolution of preliminary or dispositive matters, the Default Adjudicative Process for protests will commence upon the submission of the Product Team Response to the Office of Dispute Resolution for Acquisition, pursuant to § 17.17.

(b) The Director of the Office of Dispute Resolution for Acquisition shall select a DRO or a Special Master to conduct fact-finding proceedings and to provide findings and recommendations concerning some or all of the matters in controversy.

(c) The DRO or Special Master may prepare procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties. As a minimum, the protester and any intervenor(s) must submit to the Office of Dispute Resolution for Acquisition written comments with respect to the Product Team Response within five (5) business days of the Response having been filed with the Office of Dispute Resolution for Acquisition or within five (5) business days of their receipt of the Response, whichever is later. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the Office of Dispute Resolution for Acquisition.

(d) The DRO or Special Master may convene the parties and/or their representatives, as needed, to pursue the Default Adjudicative Process.

(e) If, in the sole judgment of the DRO or Special Master, the parties have presented written material sufficient to allow the protest to be decided

on the record presented, the DRO or Special Master shall have the discretion to decide the protest on that basis.

(f) The parties may engage in voluntary discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest. The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents. Where justified, the DRO or Special Master may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with time frames established in this part and with the FAA policy of providing fair and expeditious dispute resolution.

(g) The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the protest, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(h) The Director of the Office of Dispute Resolution for Acquisition may review the status of any protest in the

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Default Adjudicative Process with the DRO or Special Master during the pendency of the process.

(i) Within thirty (30) business days of the commencement of the Default Adjudicative Process, or at the discretion of the Office of Dispute Resolution for Acquisition, the DRO or Special Master will submit findings and recommendations to the Office of Dispute Resolution for Acquisition that shall contain the following:

- (1) Findings of fact;
- (2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;
- (3) A recommendation for a final FAA order; and
- (4) If appropriate, suggestions for future FAA action.

(j) In arriving at findings and recommendations relating to protests, the DRO or Special Master shall consider whether or not the Product Team actions in question had a rational basis, and whether or not the Product Team decision under question was arbitrary, capricious or an abuse of discretion. Findings of fact underlying the recommendations must be supported by substantial evidence.

(k) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with § 17.21.

(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, only upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the protest, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

(m) The time limitations set forth in this section may be extended by the Of-

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fice of Dispute Resolution for Acquisition for good cause.

§ 17.39 Default adjudicative process for contract disputes.

(a) The Default Adjudicative Process for contract disputes will commence on the latter of:

(1) The parties' submission to the Office of Dispute Resolution for Acquisition of a joint statement pursuant to § 17.27 which indicates that ADR will not be utilized; or

(2) The parties' submission to the Office of Dispute Resolution for Acquisition of notification by any party that the parties have not settled some or all of the dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) Within twenty (2) business days of the commencement of the Default Adjudicative Process, the Product Team shall prepare and submit to the Office of Dispute Resolution for Acquisition, with a copy to the contractor, a chronologically arranged and indexed Dispute File, containing all documents which are relevant to the facts and issues in dispute. The contractor will be entitled to supplement such a Dispute File with additional documents.

(c) The Director of the Office of Dispute Resolution for Acquisition shall assign a DRO or a Special Master to conduct fact-finding proceedings and provide findings and recommendations concerning the issues in dispute.

(d) The Director of the Office of Dispute Resolution for Acquisition may delegate authority to the DRO or Special Master to conduct a Status Conference within ten (10) business days of the commencement of the Default Adjudicative Process, and, may further delegate to the DRO or Special Master the authority to issue such orders or decisions to promote the efficient resolution of the contract dispute.

(e) At any such Status Conference, or as necessary during the Default Adjudicative Process, the DRO or Special Master will:

- (1) Determine the appropriate amount of discovery required to resolve the dispute;

(2) Review the need for a protective order, and if one is needed, prepare a protective order pursuant to §17.9;

(3) Determine whether any issue can be stricken; and

(4) Prepare necessary procedural orders for the proceedings.

(f) At a time or at times determined by the DRO or Special Master, and in advance of the decision of the case, the parties shall make final submissions to the Office of Dispute Resolution for Acquisition and to the DRO or Special Master, which submissions shall include the following:

(1) A joint statement of the issues;

(2) A joint statement of undisputed facts related to each issue;

(3) Separate statements of disputed facts related to each issue, with appropriate citations to documents in the Dispute File, to pages of transcripts of any hearing or deposition, or to any affidavit or exhibit which a party may wish to submit with its statement;

(4) Separate legal analyses in support of the parties' respective positions on disputed issues.

(g) Each party shall serve a copy of its final submission on the other party by means reasonable calculated so that the other party receives such submissions on the same day it is received by the Office of Dispute Resolution for Acquisition.

(h) The DRO or Special Master may decide the contract dispute on the basis of the record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, allow the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings on the record shall be conducted by the ODRA:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/

her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(i) The DRO or Special Master shall prepare findings and recommendations within thirty (30) business days from receipt of the final submissions of the parties, unless that time is extended by the Officer of Dispute Resolution for Acquisition for good cause. The findings and recommendations shall contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, a recommendation for a final FAA order, and, if appropriate, suggestions for future FAA action.

(j) As a party of the findings and recommendations, the DRO or Special Master shall review the disputed issue or issues in the context of the contract, any applicable law and the AMS. Any finding of fact set forth in the findings and recommendation must be supported by substantial evidence.

(k) The Director of the Office of Dispute Resolution for Acquisition may review the status of any contract dispute in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.

(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the contract dispute, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA

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order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personal shall be provided copies of the unredacted findings and recommendation.

(m) The time limitations set forth in this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.

(n) Attorneys fees of a qualified prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504 (a)(1).

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Subpart F—Finality and Review

§ 17.41 Final orders.

All final FAA orders regarding protests or contract disputes under this part are to be issued by the FAA Administrator or by a delegatee of the Administrator.

§ 17.43 Judicial review.

(a) A protestor or contractor may seek of a final FAA order, pursuant to 49 U.S.C. 46110, only after the administrative remedies of this part have been exhausted.

(b) A copy of the petition for review shall be filed with the Office of Dispute Resolution for Acquisition and the FAA Chief Counsel on the date that the petition for review is filed with the appropriate circuit court of appeals.

§ 17.45 Conforming amendments.

The FAA shall amend pertinent provisions of the AMS, standard contract forms and clauses, and any guidance to contracting officials, so as to conform to the provisions of this part.

APPENDIX A TO PART 17—ALTERNATIVE DISPUTE RESOLUTION (ADR)

A. The FAA dispute resolution procedures encourage the parties to protests and contract disputes to use ADR as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 5 U.S.C. 570-579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the Office of Dispute Resolution for Acquisition would

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encourage parties to consider ADR techniques such as case evaluation, mediation, or arbitration.

B. ADR encompasses a number of processes and techniques for resolving protests or contract disputes. The most commonly used types include:

(1) *Mediation*. The Neutral or Compensated Neutral ascertains the needs and interests of both parties and facilitates discussions between or among the parties and an amicable resolution of their differences, seeking approaches to bridge the gaps between the parties' respective positions. The Neutral or Compensated Neutral can meet with the parties separately, conduct joint meetings with the parties' representatives, or employ both methods in appropriate cases.

(2) *Neutral Evaluation*. At any stage during the ADR process, as the parties may agree, the Neutral or Compensated Neutral will provide a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, so as to facilitate further discussion and resolution.

(3) *Minitrial*. The minitrial resembles adjudication, but is less formal. It is used to provide an efficient process for airing and resolving more complex, fact-intensive disputes. The parties select principal representatives who should be senior officials of their respective organizations, having authority to negotiate a complete settlement. It is preferable that the principals be individuals who were not directly involved in the events leading to the dispute and who, thus, may be able to maintain a degree of impartiality during the proceeding. In order to maintain such impartiality, the principals typically serve as "judges" over the mini-trial proceeding together with the Neutral or Compensated Neutral. The proceeding is aimed at informing the principal representatives and the Neutral or Compensated Neutral of the underlying bases of the parties' positions. Each party is given the opportunity and responsibility to present its position. The presentations may be made through the parties' counsel and/or through some limited testimony of fact witnesses or experts, which may be subject to cross-examination or rebuttal. Normally, witnesses are not sworn in and transcripts are not made of the proceedings. Similarly, rules of evidence are not directly applicable, though it is recommended that the Neutral or Compensated Neutral be provided authority by the parties' ADR agreement to exclude evidence which is not relevant to the issues in dispute, for the sake of an efficient proceeding. Frequently, minitrials are followed either by direct one-on-one negotiations by the parties' principals or by meetings between the Neutral/Compensated Neutral and the parties' principals, at which the Neutral/Compensated Neutral may offer his or her views on the parties' positions (*i.e.*, Neutral Evaluation)

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and/or facilitate negotiations and ultimate
resolution via Mediation.